UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PART-TIME FACULTY ASSOCIATION AT COLUMBIA, Union-Respondent,	)	
and	)	Case 13-CB-165873
TANYA HARASYM, et al, INDIVIDUALS, Charging Parties,	)	
and	)	
PART-TIME FACULTY ASSOCIATION AT COLUMBIA, Respondent,	)	
and	)	Case 13-CB-202023
CLINT VAUPEL, Charging Party,	)	
and	)	
PART-TIME FACULTY ASSOCIATION AT COLUMBIA, Respondent,	)	
and	)	Case 13-CB-202035
COLUMBIA COLLEGE CHICAGO, Charging Party.	)	

INDIVIDUAL CHARGING PARTIES' RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO TRANSFER RECORD FROM REPRESENTATION CASE

On July 12, 2018, Respondent Part-Time Faculty Association at Columbia College ("PFAC") filed exceptions to the ALJ's decision in the above captioned case. On July 13, PFAC filed a motion requesting that the Board order the Regional Director of Region 13 to transfer the record from Case

13-RC-146452 – a representation case related to the present unfair labor practice case – to the Board.[1] The Individual Charging Parties[2] hereby oppose that motion, because: (1) the premises of PFAC's motion are erroneous; (2) PFAC has waived any basis for having the Board consider the record in the representation case; and (3) PFAC misconstrues the Board's rule regarding litigation.

Procedural History Concerning This Motion

Before addressing the merits of PFAC's motion, it is important to explain the procedural posture of the case, and the relationship of the representation case (the record of which PFAC seeks to transfer to the Board through the present motion) and the instant unfair labor practice case.

The Regional Director's Decision of April 28, 2015 in Case No. 13-RC-146452

On February 13, 2015, the United Staff of Columbia College ("US of CC"), the union that represents staff employees who work at Columbia College Chicago ("the College") in their capacity as staff, filed a petition with Region 13 seeking to add the full-time staff who teach part-time, but not as part of their staff duties ("FTST"), to its bargaining unit, in their capacity as part-time faculty (Case No. 13-RC-146452) (GC Ex. 4). On February 23, 2015, the Regional Director issued an order to show cause why the unit that US of CC sought to represent does not include part-time faculty, who are in a bargaining unit represented by PFAC (CP Ex. 1; T. 122).

In response to the order to show cause, PFAC submitted a brief (CP Ex. 2; T. 122-23) that asserted – without noting any exceptions – that FTST *are included in* PFAC's bargaining unit (CP

---

[1] At the representation hearing, which spanned 12 days, twenty-nine witnesses testified. The record includes a transcript that is about 2560 pages long and 171 exhibits.

[2] The Individual Charging Parties in Case 13-CB-165873 are Tanya Harasym, Larry Kapson, Eric Koppen, Weston Morris, Anthony Santiago, Jill Sultz and Clint Vaupel. The individual Charging Party in Case 13-CB-202023 is Clint Vaupel.

Ex. 2 pp. 2 & 12). The Regional Director issued a decision on April 28, 2015 (GC Ex. 5; see T. 71-72), relying in large part on the representations in PFAC's brief (and in the College's brief) that FTST are included in PFAC's unit of all part-time faculty when they perform their part-time teaching work (GC Ex. 5 p. 2). Furthermore, that decision went on to say that this conclusion was:

> further affirmed by the PFAC collective bargaining agreement wherein the Recognition clause clearly states that "[t]he Unit includes all part-time faculty members who have completed teaching at least one (1) semester at Columbia College Chicago..."

(GC Ex. 5 p. 2). Moreover, the Regional Director found:

> Further refuting the Petitioner's claim that these employees are not represented [by PFAC], the Employer and PFAC affirmatively state that PFAC does represent all part-time faculty.

(GC Ex. 5 p. 2). Furthermore, the Regional Director rejected the argument that FTST had been historically excluded from the PFAC bargaining unit:

> The facts remain that when these employees are not acting in their capacity as staff employees, they are part-time faculty, the certified unit includes all part-time faculty, and the PFAC and Employer both acknowledge that all part-time faculty are included in the existing PFAC unit.

(GC Ex. 5 p. 2). The Regional Director also rejected a reading of the contractual exclusion of staff employees from PFAC's bargaining unit, when staff employees teach part-time, but not as part of their staff duties:

> The Petitioner [US of CC] states that the interpretation of the exclusions language, which includes "Columbia College Chicago full-time staff members", has led to the treatment of these employees as not being in the unit. As acknowledged by all parties, the part-time faculty and staff duties are separate. The above-referenced exclusion language does prevent PFAC from bargaining over terms and conditions of employment for staff employees, similar to the Petitioner's collective bargaining agreement excluding faculty which prevents the Petitioner from bargaining over terms and conditions of employment for faculty despite many staff employees being employed as part-time faculty.

(GC Ex. 5 p. 2). Finding that there was no question concerning representation, the Regional Director dismissed the petition because, for "the employees in the petition who meet the bargaining unit criteria set forth in the Certification of Representative in 13-RC-19791 [i.e., FTST], PFAC is their exclusive collective bargaining representative" (GC Ex. 5 p. 2).

Thus, the Regional Director found that, when they teach part-time (not as part of their duties as staff), the FTST are members of PFAC's bargaining unit as long as they have taught at least one semester at the College. The College's representative and in-house attorney, Terence Smith, testified in the present ULP case that he read that decision to mean that the Regional Director ruled, "following the briefs in that case that the FTST were already included in the existing PFAC unit" (T. 72).

At the ULP hearing before the ALJ, the parties stipulated that no party filed a petition with the Board seeking review of the Regional Director's decision of April 28, 2015 (T. 284).

The Revocation of the Dismissal of US of CC's Representation Petition

On April 22, 2016, the Regional Director revoked the dismissal of US of CC's representation petition, stating that the "decision to dismiss the petition was based on the parties' positions submitted in response to the Regional Director's Order to Show Cause" (CP Ex. 1) and that "P-fac's position was that the petitioned-for employees were included in the bargaining unit" (GC Ex. 12). However, "[s]ince the petition was dismissed, P-fac submitted evidence in the investigation of unfair labor practice allegations that P-fac did not recognize the petitioned-for employees as part of the P-fac bargaining unit when the petition was filed" (GC Ex. 12).

The Regional Director's Decision of August 30, 2016 Based on the Representation Hearing

Following a lengthy representation hearing (T. 120; see GC Ex. 1(k) p. 6), the Regional

Director issued a Decision and Order on August 30, 2016 (GC Ex. 13; T. 90). Based on an exhaustive analysis of the evidence presented at the hearing, including the many factors relating to the terms and conditions of employment of the FTST (and of other part-time faculty), the Regional Director concluded that FTST have an employment relationship with the College that is separate and independent from their employment as staff; that, in their capacity as part-time faculty, they have the identical duties and they work under the same terms and conditions of employment as other part-time faculty; that they are dual-function employees; and that, in their part-time teaching capacity, they are already included in the PFAC bargaining unit.

The Regional Director concluded that there was no question concerning representation, and he accordingly dismissed US of CC's petition under the contract bar doctrine, because the collective bargaining agreement between PFAC and the College governs the terms and conditions of employment of the FTST. The Regional Director also found that "any agreement between the Employer and PFAC to exclude the petitioned-for group of employees, in their capacity as part-time faculty [viz, the FTST] would be contrary to Board policy."

PFAC's Request for Review, and the Board's Denial Thereof

As the parties stipulated in the present ULP case, PFAC filed a request for review, and a motion to stay the Regional Director's Decision and Order of August 30, 2016 (T. 284-85; see also T. 129). The Board denied PFAC's request for review (GC Ex. 19). The Board did not rule on PFAC's motion for a stay (T. 284-85).

The ALJ's Granting of the Charging Parties' Motion in Limine

After extensive briefing in the unfair labor practice case prior to the ULP hearing before the ALJ (GC Exs. 1(k), 1(u), 1(v), 1(w) & 1(x)), on September 5, 2017 the ALJ granted the Individual

Charging Parties' motion in limine, precluding all parties from "presenting evidence or relitigating any issue which was, or could have been, raised in the underlying representation proceeding, including whether the FTST are included in the PFAC bargaining unit" (GC Ex. 1(y)).

The ALJ similarly ruled at the hearing (T. 46). And, in her decision after the ULP hearing, the ALJ reaffirmed her ruling on the motion in limine (ALJ Dec. at 10-11).

Argument

I. The Premises of PFAC's Motion are Erroneous

A. There Were no Unresolved Representation Issues in the ULP Case

In its present motion, PFAC asserts that, in the ALJ's decision, she said that the charges in this case "raised unresolved issues of representation concerning whether the bargaining unit in the CBA included . . . full-time staff . . . who teach part-time (FTST)," citing ALJ Dec. page 2 (PFAC's Motion at page 1 ¶ 1). But those unresolved issues were resolved in the representation case, based on a twelve-day representation hearing, as explained above.

B. The Regional Director's Determination in the Representation Case Became Final Once the Board Denied PFAC's Request for Review

Although PFAC acknowledges that, in his decision of August 30, 2016 in the representation case, the Regional Director found that the FTST employees were included in PFAC's bargaining unit, and that PFAC filed a request for review, which the Board denied (PFAC's motion page 2 ¶¶ 4-6), PFAC argues that the Board's denial of the request for review still leaves open the determination of whether FTST are included in its bargaining unit (PFAC's motion page 2 ¶ 7), and that the Board's consideration of PFAC's exceptions to the ALJ's decision "represent[s] the Board's first opportunity to rule on the Regional Director's resolution of the representational issues in case

13-RC-146452—i.e., to rule on whether the Regional Director correctly held that the FTST employees are included rather than excluded from the unit" (PFAC's motion page 2 ¶ 8). But that is not true, because the issue of whether FTST are included in PFAC's bargaining unit was squarely raised – indeed it was the only, and the dispositive, issue – in the representation case, and was the basis for PFAC's request for review.

Under the Board's rules and case law, the determinations by the Regional Director – including that FTST are included in PFAC's bargaining unit – were final once the Board denied PFAC's request for review in the representation case. See Section 102.67(b) of the Board's Rules ("The decision of the Regional Director shall be final") and Section 102.67(f) that were in effect at the time the representation case was filed ("Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues [i.e., "any issue which was, or could have been, raised in the representation proceeding"] in any related subsequent unfair labor practice proceeding").[3] *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (2017) ("as a matter of Board law and procedure ... a Regional Director's decision is final – and thus may have preclusive effect – if no request for review is made (as here) or if the Board denies a request for review"; "[i]t does not matter that the Board itself did not address the issue"); *The Mirage Casino-Hotel*, 364 NLRB No. 1, n. 2 (2016), review granted & enf't denied on other grds, 863 F.3d 839 (D.C. Cir. 2017) (rejecting respondent's affirmative defense in ULP case that the Board did not rule on the respondent's contention that certain employees were confidential, because the Board's order denying respondent's request for review of the regional director's decision in the representation case (on the ground that it raised no substantial issues warranting review)

[3] That provision appears in Section 102.67(g) of the Board's current rules.

thereby affirmed the regional director's finding regarding the confidential status of those employees); *Golden West Broadcasters-KTLA*, 220 NLRB 937, 938 (1975) (because issues respondent raised in ULP case "were raised and litigated at length in" the representation proceeding, respondent was precluded from relitigating those issues in ULP case, under "well settled" principles; granting motion for summary judgment since respondent "has not raised any issue which is properly litigable in this unfair labor practice proceeding").

A federal district court ruled on this very question in a case brought by PFAC against the College, in which PFAC contended that the Board's denial of review in the representation case was not final. The court rejected that contention:

> The Board's denial of review stands as an affirmance of that decision and constitutes final agency action. *See* 29 C.F.R. § 102.67(g)11; *see also Yellow Freight*, 684 F.2d at 529 ("the NLRB declined this request for review, and thus affirmed the regional director's decision"); *Wolf Creek Nuclear Operating Corp. & Int'l Bhd. of Elec. Workers, Local 225, Petitioner*, 365 NLRB No. 55 (Apr. 7, 2017) ("It is also clear as a matter of Board law and procedure that a Regional Director's decision is final—and thus may have preclusive effect—if no request for review is made ... or if the Board denies a request for review."). It does not matter that Board did not itself address the substance of the representation issue; the dismissal affirmed the Director's ruling. *Id*. In arguing that there is no final NLRB action here, PFAC simply ignores the Board's own regulation regarding the finality of its actions. Under that regulation, the Regional Director's ruling stands as the Board's determination that FTST "are already included in the PFAC unit in their capacity as part-time faculty and covered by the PFAC contract."

Part-Time Faculty Association at Columbia College Chicago v. Columbia College Chicago, 2017 WL 5192023, at *7 (N.D. Ill. 2017). The Seventh Circuit affirmed that decision. 892 F.3d 860 (7th Cir. 2018). On July 18, 2018, the court denied PFAC's motion for rehearing and for rehearing en banc (submitted herewith as exhibit 1).

II. PFAC Has Waived Any Basis for Having the Board Consider the Record in the Representation Case

The basis for PFAC's present motion is that, by granting the Individual Charging Parties' motion in limine, the ALJ "barred the parties from relitigating the issues in 13-RC-146452, relying upon 29 C.F.R. 102.67(g). Hence the record of the instant proceedings does not incorporate the record of case 13-RC-146452" (PFAC's motion page 3 ¶ 9). PFAC claims that its "motion is necessary in order to preserve Respondent's argument" that the August 30, 2016 Regional Director unit determination "was incorrectly decided" (PFAC's motion page 3 ¶ 11). But PFAC has already failed to preserve or properly raise any challenge to the ALJ's granting of the Individual Charging Parties' motion in limine, for the reasons that follow. Accordingly, its motion should be denied.

A. In its Exceptions, PFAC Did Not Except to the ALJ's Having Granted the Motion in Limine Which Barred the Use of Evidence from That Representation Case

In its exceptions in the present case, PFAC did not except to the ALJ's granting the Individual Charging Parties' motion in limine, precluding all parties from "presenting evidence or relitigating any issue which was, or could have been, raised in the underlying representation proceeding, including whether the FTST are included in the PFAC bargaining unit" (GC Ex. 1(y)). PFAC's only references in its exceptions to the ALJ's exclusion of such evidence were that the "ALJ erred by refusing to hear evidence and argument regarding the proper scope of the unit," and "Hence the ALJ should have permitted P-fac to present evidence and argument on the proper scope of the unit PFAC" (PFAC Exc. No. 6, pages 11 & 14). But PFAC wholly failed to support those cryptic statements with any explanation, argument or citation of authority as to how or why the ALJ erred in granting the motion in limine or excluding such evidence.

Under Section102.46(a)(1)(D) of the Board's rules, "If no supporting brief is filed [as in the present case], the exceptions document must also include the citation of authorities and argument in support of the exceptions." Under Section 102.46(a)(1)(ii) of the Board's rules, "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded."

Thus, PFAC's failure to have excepted to the ALJ's having granted the motion in limine (and her reaffirming that ruling in her post-hearing decision) – or, at the least, PFAC's failure to have provided any explanation, argument and citation of authorities in support of any such exception – waived its right to challenge that ruling by the ALJ. *In Re White Elec. Constr. Co.*, 345 NLRB 1095, 1096 (2005) (Board did not address issue where General Counsel did not except to ALJ's finding; "General Counsel is procedurally foreclosed from raising this issue for consideration by the Board in his answering brief"); *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993), enf'd, 41 F.3d 1507 (6th Cir. 1994) ("Although the General Counsel discusses this incident in his brief accompanying his exceptions, he failed to except to the judge's dismissal of this violation in his exceptions. Under these circumstances, we adopt the judge's dismissal without considering the merits of the allegation," citing Section 102.46 of the Board's rules); *Tramont Mfg., LLC*, 365 NLRB No. 59 (2017), review granted in part & denied in part, 890 F.3d 1114 (D.C. Cir. 2018) (due to respondent's failure to present argument in support of its exception, the exception was disregarded, pursuant to Section 102.46 of the Board's rules); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 695 n.1 (2005), enf'd, 456 F.3d 265 (1st Cir. 2006) ("The Respondent merely recites the findings excepted to and cites to the judge's decision without stating, either in its exceptions or its supporting brief, on what grounds

the purportedly erroneous findings should be overturned. Under these circumstances, we find, in accordance with Sec. 102.46(b)(2), that the Respondent's exceptions to the foregoing unfair labor practice findings should be disregarded"); *Southside Med. Ctr., Inc*., 356 NLRB 295, 296 n.1 (2010) ("As the Respondent did not proffer any argument or articulate any grounds for reversing the judge's conclusion, however, we find that it has effectively waived this exception"); *Gaetano & Associates*, 344 NLRB 531, 531 n.6 (2005), enf'd, 183 Fed. Appx. 17 (2d Cir. 2006).

Because PFAC cannot now ask the Board to consider an issue as to which PFAC has not excepted, there is no need – or basis – to consider the record from the representation case.

B. PFAC Waived This Issue By Failing to Raise it in its in Post-Hearing Brief to the ALJ

In its post-hearing brief to ALJ, PFAC did not dispute the ALJ's ruling on the motion in limine or her reaffirming that ruling at the hearing. Instead, it merely referred to her ruling at the hearing (PFAC's Post-Hearing Brief at 4). A failure to raise in a post-hearing brief a ruling made pre-hearing or at the hearing fails to preserve the issue before the Board. *Approved Electric Corp,* 356 NLRB 238, 240 n.1 (2010) ("We need not pass on that finding [by the ALJ] because the Respondent waived its 10 (b) defense by failing to raise it until its posthearing brief"); *Dayton Newspapers*, 339 NLRB 650, 653 n.8 (2003), enf'd in part & denied in part on other grounds, 402 F.3d 651 (6th Cir. 2005).

C. PFAC Waived This Issue By Failing to Offer The Record From the Representation Case at the ULP Hearing

In its motion, PFAC does not contend that, at the ULP hearing before the ALJ, it moved to admit the record from the representation case. The failure to have done so waives this issue. *Bodine v. Warden of Joseph Harp Correction Center*, 217 Fed. Appx. 811, 814 (10th Cir. 2007) (court

agrees "that defense counsel waived further consideration of the issue in light of his failure to seek admission of [the document]").

D. The Case PFAC Relies on Does Not Support its Motion; in Fact That Decision Supports the Preclusive Effect of the Regional Director's Decision

PFAC cites *Affiliated Midwest Hosp., Inc.*, 274 NLRB 900, 901 (1985), for the proposition that a "party that failed to draw Board's attention to inadequacy of record waived right to rely on that record in subsequent proceedings" (PFAC's motion page 3 ¶ 11). But the Board did not so hold in that case. Rather, the Board's ruling in that case supports the principle that a respondent in a ULP case cannot relitigate issues that were decided in a related representation case:

> It thus appears that Respondent is attempting to raise herein issues which were raised and determined in the underlying representation cases. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.
>
> All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

266 NLRB at 1199.

III. PFAC Misconstrues the Board's Rule Precluding Relitigation

PFAC asserts that the Board does not need to follow its own rules:

> Transfer of the record in case 13-RC-146452 is also proper because, while the non-relitigation doctrine may prevent the parties from relitigating representational issues in the interest of administrative economy, it does not prevent the Board from addressing a question of representation that is properly before it. See 29 C.F.R. 102.67(g) (restraining a "party" from "relitigating," not the Board from exercising its

plenary Section 9 power to decide questions of representation).

(PFAC's Motion at page 3 ¶ 12).

But that is *not* what the express terms of Section 106.67(g) of the Board's rules states. It states "Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." Contrary to PFAC's assertion, the rule is not written as a limitation on "a 'party' from 'relitigating." Nor does it say anything about the Board itself being outside the scope of the rule. As the Board ruled in *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55, "as a matter of Board law and procedure ... a Regional Director's decision is final – and thus may have preclusive effect – if no request for review is made (as here) or if the Board denies a request for review."

IV. The General Counsel Joins in This Response

On July 18, 2018, Counsel for the General Counsel Sylvia Posey authorized undersigned counsel for the Individual Charging Parties to represent that the General Counsel joins in this response.

Conclusion

Accordingly, for the foregoing reasons, PFAC's motion to transfer the record should be denied.

Respectfully submitted,

/s/ Michael H. Slutsky

Attorney for Charging Parties Tanya Harasym, Larry Kapson, Eric Koppen, Weston Morris, Anthony Santiago, Jill Sultz and Clint Vaupel in Case 13-CB-165873; and for Charging Party Clint Vaupel in Case 13-CB-202023

Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street, Suite 2600
Chicago, Illinois 60606
312-364-9400
Fax 312-326-9410
Slutsky@ask-attorneys.com
July 18, 2018

Certificate of Service

The undersigned attorney hereby certifies that he caused copies of the foregoing Individual Charging Parties' Response in Opposition to Respondent's Motion to Transfer Record From Representation Case to be served on the persons listed below by email, this 18th day of July, 2018:

Michael P. Persoon
Despres, Schwartz & Geoghegan, Ltd
77 W. Washington St., Ste. 711
Chicago, Illinois 60602
mpersoon@dsgchicago.com

Terence Smith
Legal Counsel
Columbia College Chicago
600 S. Michigan Ave., Rm 507
Chicago, Illinois 60605
tsmith@colum.edu

Alex Barbour
Cozen O'Connor
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
abarbour@cozen.com

Sylvia Posey
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 S. Dearborn Street, Suite 808
Chicago, IL 60604
Sylvia.Posey@nlrb.gov

/s/ Michael H. Slutsky
Michael H. Slutsky